UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

GOODMAN

Mailed: June 23, 2003

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

Opposition No. 91125367

ULTIMATE NUTRITION, INC.

v.

WELLNESS LIFESTYLES, INC.

Before, Hanak, Chapman and Holtzman, Administrative Trademark Judges.

By the Board:

An application has been filed by Wellness Lifestyles, Inc. to register the mark ULTIMATE for "nutritional supplements, not including liquid beverages or juice products" in International Class 5.[1]

Registration has been opposed by Ultimate Nutrition, Inc. under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used and registered mark ULTIMATE NUTRITION

[1] Application Serial No. 76/057,447, filed may 26, 2000, alleging a date of first use and first use in commerce of April 1, 1997.

for "vitamins, and nutritional food supplements" in International Class 5.[2]

Applicant, in its answer, denied the salient allegations in the notice of opposition.

This case now comes up for consideration of opposer's motion for summary judgment on the issues of priority and likelihood of confusion.

We will first consider whether opposer's motion for summary judgment is timely (as applicant has requested that the Board deem it untimely based on the Thanksgiving holiday).

Opposer's testimony period as originally set, was scheduled to open on December 3, 2002. Inasmuch as opposer filed its motion for summary judgment on November 26, 2002, the motion for summary judgment was timely filed prior to the opening of the first testimony period as set forth in Trademark Rule 2.127(e)(1).

We now turn to consideration of the merits of opposer's motion for summary judgment.

In support of its motion for summary judgment, opposer argues that there is no genuine issue of material fact pertaining to likelihood of confusion because "the

[2] Registration No. 1,541,169, registered May 30, 1989, claiming a date of first use in commerce of November 1985. The term "nutrition" has been disclaimed.

relevant Du Pont factors of record dictate that a likelihood of confusion exists."

Specifically, opposer contends that its ULTIMATE NUTRITION mark and applicant's ULTIMATE mark have "obvious strong similarities in sound and appearance and create the same commercial impressions" when compared in their entireties. Opposer argues that both marks contain the term ULTIMATE; and that ULTIMATE is the dominant portion of opposer's mark because the word NUTRITION is "either highly suggestive or descriptive." Further, opposer argues that the "nutritional supplements component of applicant's statement of goods are identical to opposer's registered nutritional supplements and the goods marketed under opposer's mark"; and that because neither opposer's registration nor applicant's application recite any restrictions to the channels of trade or class of purchasers, it must be assumed that the goods travel in the same channels of trade and reach the same classes of purchasers.

As exhibits, opposer has submitted a status and title copy of its pleaded Registration No. 1,541,169; the declaration of its President Victor Rubino; a copy of the file wrapper for the involved application; and a dictionary definition for the word ULTIMATE. The Rubino

declaration is accompanied by examples of opposer's use of its mark on labels and in advertising.

In response to opposer's motion for summary judgment, applicant does not dispute the similarity between the parties' marks or the parties' goods. Rather, applicant maintains that there are genuine issues of material fact as to the issue of likelihood of confusion because 1) applicant's goods are sold via "multi-level marketing techniques" rather than in retail stores and therefore, the parties operate in different channels of trade; 2) there has been no actual confusion between the parties' marks during the "6 years of concurrent use"; 3) applicant uses its mark ULTIMATE in conjunction with its house mark AMERICAN LONGEVITY which "makes it distinctive" from opposer's ULTIMATE NUTRITION mark; and 4) applicant has used the mark ULTIMATE continuously since April 1997 on its goods both alone and in conjunction with other words forming composite trademarks, including registrations owned by applicant's President for ULTIMATE DAILY, ULTIMATE CAL and ULTIMATE ENZYMES.

As exhibits, applicant has submitted a declaration of its President, Joel Wallach, and applicant's responses to opposer's first set of interrogatories. The Wallach

declaration is accompanied by an excerpt from applicant's policy and procedure manual.

In reply, opposer points out that applicant, in its response, does not question the similarity of the marks or the goods but only argues that there are genuine issues as to channels of trade and actual confusion. Opposer argues that because neither applicant's application nor opposer's registration have limitations as to the channels of trade or class of purchasers, the channels of trade are "legally presumed to be the same" and are not "factually in dispute"; that the "goods of both parties ultimately reach the consuming public for ingestion by individual purchasers as nutritional supplements"; and that the parties conduct "overlapping marketing." Further, opposer contends that "the absence of [any known instances of] actual confusion is not a fact in dispute," and evidence of actual confusion is not required in order to establish likelihood of confusion; that applicant's house mark is not part of the mark applicant has applied for; that the three registrations owned by applicant's President are each two word marks containing the term ULTIMATE and are junior to opposer's pleaded registration; and that "no argument is presented

as to why or how these registrations are supportive of applicant's argument as to lack of confusion."

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law.[3] *See* Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). A factual dispute is genuine, if, on the evidence of record, a reasonable finder of fact could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992), and *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). The evidence must be viewed in a light most favorable to the non-movant, and all justifiable

[3] Applicant has stated in its brief, citing a First Circuit case, that "likelihood of confusion has been termed a question of fact." That is incorrect in proceedings before this Board, because our primary reviewing court has stated, "a determination of likelihood of confusion [is] a question of law based on findings of relevant underlying facts." [emphasis added] *In re Majestic Distilling Co.*, 315 F3d 1311, 1314, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

inferences are to be drawn in the non-movant's favor. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993), and *Opryland USA, supra*.

Based on the submissions of the parties, we find that opposer has met its burden of demonstrating that there are no genuine issues of material fact, and that opposer is entitled to judgment as a matter of law.

There is no genuine issue of fact as to opposer's priority because opposer has made of record a status and title copy of its pleaded Registration No. 1,541,169 for ULTIMATE NUTRITION for vitamins, and nutritional food supplements. *King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

With respect to the issue of likelihood of confusion, we are guided by the factors set forth in the case of *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).

Considering first the parties' marks, it is well established that marks must be compared in their entireties and that if one feature of a mark is more significant than another feature, it is proper to give greater force and effect to that dominant feature. *See*

e.g., Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Descriptive or generic wording is less significant for purposes of determining likelihood of confusion. *See e.g., Kangol Ltd. v. KangaRoos U.S.A. Inc.* 974 F.2d 161, 23 UPQ2d 1945, 1946 (Fed. Cir. 1992); and *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988).

In this case, opposer's pleaded mark ULTIMATE NUTRITION and applicant's mark ULTIMATE, both in typed form, are substantially similar in sound, appearance, connotation, and commercial impression. The dominant portion of opposer's mark is "ULTIMATE." Applicant's mark, ULTIMATE is identical to the most significant and distinctive feature of opposer's mark.

The disclaimed term "NUTRITION" in opposer's mark is, without dispute, descriptive if not generic for its goods, and does nothing to change the commercial impression of opposer's mark or otherwise distinguish one mark from the other. Therefore, when compared in their entireties, there is no genuine issue that the parties' marks are similar in appearance, pronunciation and connotation, and create a highly similar commercial impression.

Applicant's arguments with regard to use of its house mark AMERICAN LONGEVITY are irrelevant because the house mark is not part of applicant's mark in this case. *See e.g., Super Valu Stores Inc. v. Exxon Corp.*, 11 USPQ2d 1539, 1544 (TTAB 1989).

With regard to the goods of the pleaded registration and involved application, there is no genuine issue that the parties' goods are legally identical. Opposer's goods, identified as "vitamins, and nutritional food supplements" are encompassed by applicant's goods, namely, "nutritional supplements, not including liquid beverages or juice products."

Because the goods are legally identical, they are deemed to travel in the same channels of trade to the same purchasers. *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). Applicant's assertion that its goods are sold via multi-level marketing techniques rather than through retail stores is unpersuasive as there is no such recitation in applicant's identification of goods. The question of likelihood of confusion must be determined in accordance with the identification of goods in applicant's application and in opposer's registration, and where there are no restrictions therein, it must be presumed that the parties' goods move through all of the

normal channels of trade to all classes of purchasers. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Tiffany & Co. v. Classic Motor Carriages Inc.*, 10 USPQ2d 1835, 1843 (TTAB 1989). Here, neither opposer's pleaded registration nor the involved application has restrictions as to the channels of trade or purchasers.

With regard to applicant's arguments as to lack of actual confusion, we find that the absence of actual confusion is not sufficient to raise a genuine issue because opposer is not required to prove actual confusion in order to make a prima facie showing of likelihood of confusion. *See Giant Food v. Nation's FoodService, 710 F.2d at 1571, 218 USPQ at 396; McDonald's Corp. v. McClain*, 37 USPQ2d 1274 (TTAB 1995).

Lastly, to the extent that applicant is attempting to raise a genuine issue by the existence of third-party registrations for ULTIMATE DAILY, ULTIMATE CAL and ULTIMATE ENZYMES for similar goods, we note that these registrations are not owned by applicant; and in any event, convey different commercial impressions than applicant's ULTIMATE mark. *See e.g., TBC Corp. v. Grand Prix Ltd.*, 12 USPQ2d 1311, 1314 (TTAB 1989). Thus, applicant has failed to disclose any evidence that points

to the existence of any genuine issue of material fact on the issue of likelihood of confusion.

We find therefore that opposer has carried its burden of proof that no genuine issues of material fact remain as to priority and likelihood of confusion and that opposer is entitled to judgment as a matter of law.

In view thereof, opposer's motion for summary judgment is granted, the opposition is sustained and registration to applicant is refused.